

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:)	Chapter 11 Case
)	Number <u>88-40864</u>
HAILE COMPANY)	
d/b/a HAILE TOBACCO COMPANY)	
)	FILED
Debtor)	at 11 O'clock & 34 min. P.M.
)	Date: 9-27-91
<hr/>		
HAILE COMPANY)	
d/b/a HAILE TOBACCO COMPANY)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>90-4118</u>
R. J. REYNOLDS TOBACCO COMPANY,)	
PHILLIP MORRIS, LORILLARD, INC.,)	
BROWN & WILLIAMSON TOBACCO)	
CORPORATION, AND THE AMERICAN)	
TOBACCO COMPANY)	
)	
Defendants)	

ORDER

Each defendant has filed a motion for summary judgment in its favor and against plaintiff, Haile Company d/b/a Haile Tobacco Company, debtor in this Chapter 11 case. Defendants submitted a consolidated brief in support of their individual motions. Defendants, R. J. Reynolds Tobacco Company, Phillip Morris, Lorillard, Inc., Brown & Williamson Tobacco Corporation, and The American Tobacco Company are members of the creditors' committee in

plaintiff's Chapter 11 case, appointed pursuant to 11 U.S.C. §1102.

Plaintiff is headquartered in Savannah, Georgia, and operated as a distributor of cigarettes and candies for defendants. Plaintiff brought this adversary proceeding alleging defendants conspired to drive plaintiff out of business as a means of limiting the number of distributors in plaintiff's area. Plaintiff alleges that defendants, acting in concert and in bad faith, pursued a motion to convert plaintiff's Chapter 11 case and noticed plaintiff's creditor-suppliers of the motion to get them to discontinue shipments to plaintiff. Plaintiff further alleges defendants conspired to impose quotas on plaintiff's cash sales designed to strangle plaintiff's cash flow. Plaintiff contends that as a result of these and other alleged conspiratorial acts of defendants, plaintiff has been injured and is entitled to damages. Defendants moved for summary judgment contending they are entitled to judgment as a matter of law.

Rule 56 of the Federal Rules of Civil Procedures (FRCP), made applicable to adversary proceedings by Bankruptcy Rule 7056, provides that "[a] party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." The moving party bears the burden to prove "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56(c). See also

Celotex Corp. v. Catrett, 477 U.S. 316, 106 S.Ct. 2548, 91 L.E.2d 265 (1986); Cowan v. J.C. Penny Co., 790 F.2d 1529, 1530 (11th Cir. 1986). "In determining whether the movant has met its burden, the reviewing court must examine the evidence in a light most favorable to the opponent of the motion. All reasonable doubts and inferences should be resolved in favor of the opponent [to the summary judgment motion]." Amey, Inc. v. Gulf Abstract Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985) (citations omitted).

In support of their motions for summary judgment, defendants contend in brief 1) that they are absolutely immune from liability as members of the Chapter 11 creditors' committee; 2) that plaintiff lacks standing to sue defendants because the creditors' committee owed no fiduciary duty to plaintiff as the Chapter 11 debtor; 3) that defendants' acts referenced in the complaint were in good faith; 4) that mailing notice to creditors of the motion to convert was court-authorized and therefore lawful; 5) that there was no conspiracy; and 6) that quotas were uniformly applied to all distributors and therefore did not discriminate against plaintiff.

Defendants contend they are absolutely immune from liability because as members of the creditors' committee purportedly fulfilling their statutory duties, they performed a quasi-judicial function. Judicial officers are immune from liability for acts within their judicial jurisdiction, Pierson v. Ray, 386 U.S. 547, 553, 87 S.Ct. 1213, 1217, 18 L.E.2d 288 (1967), and trustees have

derived limited immunity when performing an act under the bankruptcy court's supervision and within the scope of their authority as trustees. In re: Tucker Freightlines, Inc., 62 B.R. 213, 217-18 (Bankr. W.D. Mich. 1986). See; also Boullion v. McClanahan, 639 F.2d 213 (5th Cir. Unit A 1981); Bennett v. Williams, 87 B.R. 122 (Bankr. S.D. Cal. 1988), aff'd, 892 F.2d 822 (9th Cir. 1989). Defendants have cited no authority, nor has the court located any which supports defendants' contention that as members of the creditors' committee, they are absolutely immune from liability for their alleged wrongful acts. A creditors' committee may have limited immunity when performing specific, statutorily prescribed functions, see Tucker, supra, at 216; however, if plaintiff's allegation that defendants conspired to drive plaintiff out of business is true, it cannot be said that defendants were acting within the scope of their statutory duties in furtherance of the conspiracy. Id. There is no immunity applicable to defendants which would shield them from potential liability in this case.

Defendants contend plaintiff lacks standing to assert its cause of action because a creditors' committee does not owe a Chapter 11 debtor a fiduciary duty. Plaintiff's cause of action is based on an alleged conspiracy. "A civil conspiracy is defined as an agreement between two or more people to participate in an unlawful act or a lawful act in an unlawful manner." Hobson v. Wilson, 737 F.2d 1, 51 (D.C. Cir. 1984). A fiduciary duty is not an element which plaintiff must establish to show defendants

conspired against plaintiff. See Id. Moreover, plaintiff does not allege in its complaint that defendants owed plaintiff a fiduciary duty. Whether or not defendants owed plaintiff a fiduciary duty is not an issue in resolving this motion for summary judgment. Plaintiff has standing to assert its cause of action.

Defendants' remaining arguments -- that defendants acted in good faith, that mailing notice to creditors of the motion to convert was lawful, that there was no conspiracy, and that quotas were uniformly applied -- necessarily involve factual inquiries inappropriate for summary judgment. To prevail on a motion for summary judgment, defendants must prove there is no dispute as to any material fact and that based on the material facts, to which the parties are in agreement, defendants are entitled to judgment as a matter of law. See Celotex, Cowan, supra. Defendants have failed to prove there are no factual issues for trial in this case. Plaintiff's cause of action, by its nature, involves numerous factual issues regarding defendants' motives and the existence of a conspiratorial scheme. Summary judgment is inappropriate "where motive and intent play leading roles." Poller v. Columbia Broadcasting Systems, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.E.2d 458 (1962). Accord Amey Inc., supra, at 1502.

It is therefore ORDERED that defendants' motions for summary judgment are denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 27th day of September, 1991.